92-1632

CASE NO.____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

IN RE: CARRIE LOIS QUALLS

PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION TO THE
UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF LOUISIANNA

PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION

C. DANIEL STREET
ATTORNEY AT LAW
2901 EVANGELINE
MONROE, LOUISIANA 71201
318-325-4418
ATTORNEY FOR PETITIONER

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

QUESTIONS PRESENTED

1. Whether the Honorable F. A. Little, Jr., District Court Judge, exceeded his power under the Federal Rules of Civil Procedure by ordering Petitioner to sign a blanket medical authorization which allows the defense to procure medical reports and information not relevant to the claimed injuries and which allows oral, private communications by defense counsel, his agent or adjuster with physicians who have treated Petitioner for any condition.

2. Whether the Honorable F. A. Little, Jr., District Court Judge, is bound by Louisiana law which only allows the discovery of medical information relevant to the claimed injuries.

3. Whether the Honorable District Judge's order requiring Petitioner to sign a blanket medical authorization violates Petitioner's right to privacy under the First, Fourth, Fifth, Nineth and Fourteenth Amendments of the United States Constitution.

PARTIES

PETITIONER: Carrie Lois Qualls

RESPONDENTS: Honorable F. A. Little, Jr.,
United States District Judge
Western District Of Louisiana,
Alexandria Division

K Mart Corporation,
Defendant in the suit below.

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OFFICIAL REPORT OF OPINION BELOW

The opinion of the Honorable F. A. Little, Jr., Judge of the United States District Court for the Western District of Louisiana, Alexandria Division, is contained in his "Ruling" which is appended hereto. The "Ruling" is not reported in the Federal Supplement.

JURISDICTION

Jurisdiction to grant the writs of prohibition and mandamus, sought by petitioner herein, to prevent enforcement of the order entered by respondent, Honorable F. A. Little, Jr., District Court Judge, on February 26, 1993, is conferred on this Court by the provisions Section 1651 (a), Title 28, United States Code, and Rule 20 of the Rules of this Court.

BASIS OF DISTRICT COURT'S JURISDICTION

Jurisdiction is conferred on the District Court to entertain the present action which is a personal injury suit which was removed from state court by 28 USC 1332 (a), the diversity jurisdiction and 28 USC 1441, which is the authority for removal.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. Constitutional Provisions

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATUTES

28 USC 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Louisiana Revised Statute 13:3734 C

If any health care provider reasonably believes in good faith that any civil proceeding enumerated in Louisiana Evidence Code Article 510(B)(2)(a) or (b) has been or may be instituted by, or on behalf of any patient, the health care provider may disclose any communication acquired by him which was

necessary to enable him to diagnose, treat, prescribe, or act for such patient.

Federal Rules of Civil Procedure,

Rule 26(a) and (b)(1)

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books,documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking

into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Federal Rules of Evidence, Rule 501

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF THE CASE

1. This petition is filed pursuant to the authority to issue extraordinary writs vested in this Court by the provisions of Section 1651(a), Title 28, United States Code, and Rule 20 of the Rules of this Court, in order to prevent enforcement by the Honorable F. A. Little, Jr., a Judge of the United States District Court for the Western District of Louisiana, Alexandria Division, Respondent herein, of his order entered on February 26, 1993, in the case of *Carrie Lois Qualls vs. K Mart Corporation*, being Civil Action No. 92-1753 of the Monroe Division of said District Court, which action is pending before Respondent and to compel Respondent to vacate the order for the reason that Respondent had no power to enter the same or that his power was exceeded, as is more fully hereinafter alleged and argued. A copy of said Order of February 26, 1993 is included in the

Appendix to this Petition, which order is actually entitled "Ruling" on the Motion to Compel filed by Respondent K MART CORPORATION, which "Ruling" is not reported in the Federal Supplement. Petitioner applied for Writs of Mandamus and/or Prohibition to the United States Court of Appeal for the Fifth Circuit, which Court denied Petitioner's application without opinion and a copy of said ruling is likewise appended hereto.

2. There are also included in the Appendix the following papers which are essential to an understanding of the instant Petition: The original petition for damages filed by Petitioner in the Third Judicial District Court for the Parish of Lincoln, State of Louisiana, is appended to show the claim for personal injuries and said petition in paragraph 5 thereof reveals the injuries claimed. The Motion to Compel with attached Memorandum filed by Respondent K MART CORPORATION is appended as is the requested medical authorization. Petitioner's Memorandum in Opposition to the Motion to Compel is appended and, the subject medical authorization is likewise appended. Finally, there is appended a copy of the denial by the Fifth Circuit Court of Appeals of Petitioner's Application for Writ of Mandamus and/or Prohibition and there is appended a copy of the Order of the Honorable F. A. Little, Jr., United States District Judge, staying enforcement of his "ruling" or order until action by this Honorable Court on this Petition.

3. Petitioner CARRIE LOIS QUALLS and her husband Alfred Qualls filed suit in the Third Judicial District Court, Parish of Lincoln, State of Louisiana, against K Mart Corporation for damages for personal injuries received by her in an accident which occurred on or about September 4, 1991, in the Defendant's retail self-service store in Ruston, Lincoln Parish, Louisiana. Defendant K Mart Corporation removed the action to the United States District Court for the Western District of Louisiana, Monroe Division. Petitioner specified the injuries

she received in this accident in paragraph 5 of her original petition. On October 20, 1992, counsel for K Mart Corporation took the deposition on oral examination of Petitioner at her counsel's office, pursuant to a notice issued by counsel for Defendant. During the course of said deposition, counsel for Defendant produced a medical authorization and requested that Petitioner sign same. Petitioner's counsel objected to such procedure and objected to the form of said medical authorization in that it allowed persons other than counsel for Defendant himself to review said information, called for counsel for Defendant or other persons to speak orally and in private with any physician who has ever treated Petitioner for any reason and did not provide that a copy of all information obtained pursuant to it be provided to counsel for Petitioner. Several months later, Defendant filed a "Motion to Compel" requesting that the District Court order Petitioner to sign such a blanket authorization in favor of Defendant. After receiving memoranda in support of and in opposition to the said motion, the Honorable F. A. Little, Jr., United States District Judge, granted the Motion to Compel by his order entitled "Ruling" dated February 26, 1993. Petitioner applied for Writs of Mandamus and/or Prohibition with the United States Court of Appeal for the Fifth Circuit, seeking relief from said order which was denied. Petitioner therefore presents these issues to this Honorable Court.

REASONS RELIED ON FOR ALLOWANCE OF WRITS

1. The issues involved in the present proceeding are of exceptional character and of great public importance in that in virtually all personal injury suits the medical condition of the plaintiff is placed at issue. The threshhold issue is the extent of discovery allowed by the Federal Rules of Civil Procedure in this sensitive area. The core issue is the proper balance between the right of the injured plaintiff to privacy with regard to medical treatment received in the past, particularly that not related to the

claimed injury, and the right of the defendant to be able to properly defend itself. Recently, the issue of requiring the injured party to sign a medical authorization arises in virtually every personal injury suit. Obviously, the resolution of these issues by this Honorable Court will go far toward the efficient and orderly handling of personal injury claims in the Federal Courts. The present case squarely frames these issues for resolution by this Honorable Court. The need for this Court's guidance is further underscored by the fact that this Court has not spoken to these issues in many years. This Court's ruling in this case would have far reaching implications in all personal injury actions in the Federal Courts.

2. The relief herein sought is not available, and there is no adequate remedy in the Court of Appeals or any other Court other than this Court for the following reasons:

Petitioner has exhausted all available remedies in the Courts below. The Honorable Fifth Circuit Court of Appeal refused to grant any relief to Petitioner. If Petitioner is required to sign the pending medical authorization as ordered by the District Court, her privacy rights will be violated and the questions raised herein will be moot because the damage will have already been done. An appeal at the end of the case would therefore be meaningless, as Defendant would have already been allowed to obtain medical information not even remotely related to the claimed injuries. In *Schlagenhauf vs. Holder*, 379 US 104, 85 S.Ct. 234 (S. Ct.1964) this Court held that the remedy of mandamus was properly applied to a question concerning the granting of an order for a medical examination under Rule 35 of the Federal Rules of Civil Procedure. It is respectfully submitted that such remedy is likewise available herein, particularly since there is no other remedy available to Petitioner for the protection of her important constitutional rights to privacy.

3. It is respectfully submitted that the Honorable District Judge went beyond the authority available to him under the Federal Rules of Civil Procedure by ordering Petitioner to sign the subject blanket medical authorization. First, the providing of a medical authorization is not even one of the discovery methods listed in Rule 26(a) of the Federal Rules of Civil Procedure. Furthermore, Rule 26(b)(1) limits discoverable matter to that relevant to the subject matter of the pending action. It has been held that the discovery of information from treating physicians must be in accord with the discovery rules. *Gardner vs. Ford Motor Company*, 61 F.R.D. 22(D. Alaska 1983).

Furthermore, the requirement for relevancy in these circumstances is illustrated by the reasoning of the Court in *Brown vs. Ely Lilly Corporation*, 131 F.R.D. 176 (D. Neb.1988). In that case the court recognized that the defendant must prove that the information sought is relevant under Rule 26 and the Court held that it could not grant any medical authorization without such proof. The Court did order extensive production on the claim that cancer was caused by the defendant's drug but on the grounds that the cause of such cancer could be very many things. There is no such condition presented in the present case.

Also, the medical authorization which Petitioner has been ordered to sign provides that the defense attorney may get information orally from the physicians. This practice was condemned in the case of *Alston vs. Greater Southeast Community Hospital*, 107 F.R.D. 35(D.C.D.C. 1985), wherein the Court recognized that in such a private oral conversation the defense attorney could impermissibly go beyond what is relevant under Rule 26 and the Court further found that private conversations with the physicians are not contemplated by the Federal Rules of Civil Procedure. The Court further recognized that the use of depositions rather than oral discussions allows for the use of objections and protective orders if necessary.

In short, neither the Federal Rules of Civil Procedure nor any case law cited by the Defendant or the Honorable District Judge authorizes this action.

Additionally, it is respectfully submitted that the Honorable District Judge below is bound by Louisiana law which only allows the discovery of medical information relevant to the claimed injuries. Rule 501 of the Federal Rules of Evidence provides that in civil actions where state law provides the rule of decision the privilege of a person shall be determined in accordance with state law. This means that the Federal Courts must follow state privilege law in diversity cases while applying Federal common law in non diversity cases. This is also bolstered by Rule 26 (B)(1) of the Federal Rules of Civil Procedure which states that parties may obtain discovery regarding any matter "not privileged". Thus, Rule 501 of the Rules of Evidence and Rule 26 of the Rules of Procedure taken together mandate the application of the state privilege both to discovery and trial. Therefore, the physician-patient privilege provided by state law applies in this case.

Louisiana Revised Statute 13:3734 C does provide that the physician-patient privilege is waived when a tort action is brought but this has been interpreted by the state courts to mean that only information relevant to the injuries claimed are required to be disclosed. The Court stated in *Williams vs. Sistrunk*, 417 So.2d 14 (4th Cir.1982), as follows at 417 So.2nd 15:

> "The legislature, in enacting R.S. 13:3734, could not have intended to exempt unrelated information from the privilege. In an analogous situation, the court stated in *Acosta vs. Cary*, 365 So.2d 4(La.App. 4th Cir.1978). 'However, the employees waiver of privacy is necessarily implied only to the extent pertinent to the employer's defense; an employee claiming for a broken leg does not waive privacy as to his

> gastro-intestinal upsets'. That principle is applicable to R.S.13:3734."

The Honorable District Judge is bound to limit the disclosure of Plaintiff's medical information to that relevant to the claimed injuries and necessary to the defense.

Finally, it is respectfully submitted that the ruling below requiring Petitioner to sign this blanket medical authorization violates her right to privacy under the 1st, 4th, 5th, 9th and 14th amendments of the United States Constitution. This Court recognized the privacy rights of individuals in the case of *Griswold vs. Connecticut* 381 U.S. 617, 85 S.Ct. 1678 (S. Ct.1965) where the Court recognized that a penumbra of rights surround the rights granted in Amendments I, IV, V, IX, & XIV of the United States Constitution. This Court has also recognized that the right of privacy has no more conspicuous place than in the physician-patient relationship in the abortion cases of *Roe vs. Wade*, 410 U.S. 134, 93 S. Ct.705 (S. Ct.1973) and *Doe vs. Bolton*, 410 U.S. 179, 93 S. Ct. 739 (S. Ct.1973).

In considering a similar question regarding medical examinations under Rule 35 of the Federal Rules of Civil Procedure, this Court in *Schlagenhauf vs. Holder*, supra, recognized that the upholding of the constitutionality of Rule 35 allowing for medical examination by the Court in *Sibbach vs. Wilson & Company*, 312 U.S. 1, 62 S.Ct. 422 (S. Ct.1941) did not rest on a waiver of constitutional rights. The Court stated as follows at 85 S. Ct.240:

> "The chain of events leading to an ultimate determination on the merits begins with the injury of Plaintiff, an involuntary act on his part. Seeking court redress is just one step in this chain. If the Plaintiff is prevented or deterred from this redress, the loss is thereby forced on him to the same extent, as if the Defendant were prevented or deterred from defending against the action.

> Moreover, the rationalization of *Sibbach* on a waiver theory would mean that a Plaintiff has waived a right by exercising his right of access to the Federal Courts. Such a result might create constitutional problems."

The constitutional problems referred to by the Court in *Schlagenhauf* are presented herein. Petitioner has been ordered to sign a medical authorization which is virtually unlimited and any and all medical information concerning Petitioner generated in connection with any medical treatment for her entire life and for any and all conditions is allowed to be exposed to Defendant's attorney, "his agent or adjuster". Such attorney, his agent or adjuster, are allowed to have oral, private conversations with any of Plaintiff's physicians. Petitioner's privacy rights are grossly trampled by the ruling below.

In effect, Petitioner has been required to waive her constitutional right to privacy with regard to her medical treatment and condition on matters not related to the injuries involved in this action in order to maintain this action in court. This is exactly what this Honorable Court in *Schlangenhauf vs. Holder*, supra, had reference to.

It is respectfully submitted that the ruling below goes far beyond the District Court's authority under the applicable Federal Rules of Civil Procedure, violates the state law applicable in this diversity action, and results in an unnecessary and grievous violation of Petitioner's federal constitutional right to privacy.

CONCLUSION

Wherefore, Petitioner prays that this Court issue Writs of Mandamus and/or Prohibition, as this Court may deem appropriate, directed to the Honorable F. A. Little, Jr., District Judge, one of the Respondents herein, restraining said Respondent from enforcing his order contained in the Ruling of February 26, 1993, and requiring Respondent to vacate the Order.

Petitioner further prays that this Court grant Petitioner such other and further relief as it may deem to be just and equitable.

RESPECTFULLY SUBMITTED:

C. DANIEL STREET
ATTORNEY AT LAW
2901 EVANGELINE STREET
MONROE, LOUISIANA 71201
(318) 325-4418

BY:_____
C. DANIEL STREET
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, C. Daniel Street, a member of the Bar of the Supreme Court of the United States and counsel of record for Carrie Lois Qualls, Petitioner herein, hereby certify that on April ____, 1993, pursuant to Rule 29, Rules of the Supreme Court, I served one copy of the foregoing Petition for Writ of Mandamus and/or Prohibition on each of the parties herein as follows:

On the Honorable F. A. Little, Jr., United States District Judge, Respondent herein, by depositing such copy in the United States Post Office, with First Class postage prepaid, properly addressed to the District Judge at P. O. Box 1031, Alexandria, Louisiana 71309-1031.

On K Mart Corporation, Respondent herein, by depositing such copy in the United States Post Office, with First Class postage prepaid, properly addressed to the post office address of Mr. Brian P. Bowes, the said Respondent's counsel of record, at Hudson, Potts & Bernstein, P. O. Drawer 3008, Monroe, Louisiana 71210-3008.

All parties required to be served have been served.

Dated April ___, 1993.

C. DANIEL STREET
ATTORNEY AT LAW
2901 EVANGELINE STREET
MONROE, LOUISIANA 71201
(318) 325-4418

/s/_____
C. DANIEL STREET
ATTORNEY FOR PETITIONER

a1

United States District Court

WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Carrie Lois Qualls and Alfred Qualls

vs.

K- Mart Corporation

Civil Action No. 92-1753
Section "A" (Judge Little)

Filed February 26, 1993
Robert H. Shemwell, Clerk

RULING

The medical condition of Carrie Lois Qualls is at issue. This court has ruled consistently that the demand for execution of a medical release by the allegedly injured individual is proper as a pretrial discovery tool. Thus, the motion to compel is GRANTED. Plaintiff shall forthwith execute a blanket medical release form, all in accordance with Rule 37 of the Federal Rules of Civil Procedure.

Alexandria, Louisiana

26 February 1993

Copy Sent
Date: 2/26/93
By:BG
To: Street/Bowes

/s/_____
F.A. Little, Jr.
United States District Judge

State of Louisiana

PARISH OF LINCOLN
THIRD DISTRICT COURT

Carrie Lois Qualls & Alfred Qualls

Versus No. 40403

K- Mart Corporation

Filed August 12, 1992
Wanda W. Neeles, Deputy Clerk of Court

PETITION

The Petition of CARRIE LOIS QUALLS and ALFRED QUALLS, husband and wife, major residents of Jackson Parish, Louisiana, respectfully represents:

1.

Made Defendant herein is K MART CORPORATION, a foreign corporation authorized to do and actually doing business in the State of Louisiana, which Defendant is legally liable unto the Plaintiffs for the following reasons, to-wit:

2.

On or about September 4, 1991, Plaintiff, CARRIE LOIS QUALLS, was a customer in Defendant's retail self service store know as K MART which store was K MART #9567 in Ruston, Lincoln Parish, Louisiana.

3.

As Plaintiff was pushing her buggy down an aisle, a large picture frame with glass fell and Plaintiff moved suddenly to her right to try to avoid being struck by the picture frame and glass. Her buggy hit another buggy that was left in the aisle by Defendant's employees with merchandise in it and Plaintiff's foot went out from under her causing her to fall and the buggy struck her in the face. As a result of this fall and the buggy

striking her in the face, Plaintiff sustained severe injuries to be described hereinafter.

4.

Plaintiff shows that the sole and legal cause of the above described accident and all resulting injuries and damages was the fault and negligence of Defendant K MART CORPORATION through its agents, employees and those for whom it is responsible in the following specific particulars, to-wit:

a. Improperly selving and stacking its merchandise, to-wit, the picture frame, so as to create a hazardous condition;

b. Stacking the picture frames in a manner which allowed one to fall;

c. Failing to securely stack the picture frames;

d. Allowing an unreasonably dangerous condition to exist on its premises in the form of the improperly stacked picture frames;

e. Failing to warn Plaintiff of the precariously stacked picture frames;

f. Failing to properly inspect its merchandise so as to discover the improperly stacked picture frames;

g. Failing to discover the improperly stacked picture frames and remedy said conditions;

h. Leaving a cart of merchandise in the aisle thereby decreasing the maneuvering room of its customers such as Plaintiff.

5.

As a result of the above described accident, Plaintiff sustained severe and disabling injuries including a nose bleed and bruising between her nose and lips and injury to the roof of her mouth; injuries to her neck and jaw and the muscles and other components thereof including TMJ; injuries to her sinus and

face and nerves therein; and general soreness all across her body. Plaintiff suffered severe pain and continues to suffer pain and had to seek extensive medical treatment for these injuries. Accordingly, Plaintiff is entitled to recover all such damages as are reasonable in the premises from Defendant for the following, to-wit:

Past, present and future pain, suffering, disability, mental anguish, inconvenience and embarrassment.

6.

Plaintiff itemizes her medical expenses which she incurred for the treatment of her injuries and which she is entitled to recover from Defendants as follows:

Green Clinic	$234.00
Rel Gray, M.D.	325.00
Jerry Johnston, D.D.S.	605.00
Oral Surgery Center	155.00
Ruston Outpatient Physical Therapy	1,644.00
Ouachita Pharmacy	394.93
Professional Services of America, Inc.	54.18
Lincoln General Hospital	2,874.40
Family Pharmacy	28.41
Ruston/Lincoln Ambulance Service276.50	
L. King Scott, D.D.S.	979.55
Prentis Charles, D.C.	220.00
Total	7,790.97
Expected Future Medical Expense	$3,000.00
Total	$10,790.97

7.

Plaintiff ALFRED QUALLS shows that he is the spouse of Plaintiff CARRIE LOIS QUALLS and that he has suffered a loss of consortium, service and society as a result of the injuries to his wife described above and that their marital relationship has been adversely affected by her injuries and that he has had to do things for his wife that she would ordinarily do for herself.

Plaintiff therefore shows that he is entitled to recover all such damages as are reasonable in the premises from Defendant for this loss of consortium, service and society.

WHEREFORE, PLAINTIFFS PRAY that Defendant be duly served and cited with a copy of this Petition and required to appear and answer same, and after the lapse of all legal delays, and after due proceedings had, there be judgment herein in favor of Plaintiffs CARRIE LOIS QUALLS and ALFRED QUALLS and against Defendant K MART CORPORATION for all such damages as are reasonable in the premises, together with legal interest thereon from date of judicial demand, until paid and for all costs of these proceedings.

Please Serve Defendant:

K Mart Corporation
through its agent for
service of process

C. T. Corporation
Poydras Street
New Orleans, Louisiana 70130

Respectfully Submitted:

C. Daniel Street
Attorney For Plaintiff
2901 Evangeline Street
Monroe, Louisiana 71201

By:_____
/s/ C. Daniel Street

Bar No. 12530

United States District Court

WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Carrie Lois Qualls and Alfred Qualls

Versus

K-Mart Corporation

Civil Action No. 92-1753
Judge Little

NOTICE OF DEPOSITION

To: **Carrie Lois Qualls**
through her attorney of record,
Mr. C. Daniel Street
2901 Evangeline Street,
Monroe, Louisiana 71201

PLEASE TAKE NOTICE, that defendant, **K MART CORPORATION**, will take the discovery deposition of **CARRIE LOIS QUALLS**, on oral examination at the offices of her attorney MR. C. DANIEL STREET, 2901 EVANGELINE STREET, MONROE, LA, before a duly appointed court reporter who is not of counsel or attorney for any of the parties nor a relative or employee, nor such counsel of parties, nor financially interested in this case, by stipulation and agreement of counsel on **TUESDAY, OCTOBER 20, 1992 at 2:30 p.m.** and thereafter from day to day as the taking of the deposition may be adjourned at which time and place you are hereby notified to appear take part in such manner as you deem fit and proper.

Respectfully Submitted

Hudson, Potts & Bernstein
P.O. Drawer 3008
Monroe, Louisiana 71210

By:_____
/s/ Brian P. Bowes
Attorney For Defendant

CERTIFICATE

I, BRIAN P. BOWES, do hereby certify that a true and correct copy of the above and foregoing document has been mailed to all counsel of record, by mailing same, postage prepaid, all on this 1 day of October, 1992.

/s/_____
Brian P. Bowes

United States District Court

WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Carrier Lois Qualls and Alfred Qualls

Versus

K-Mart Corporation

Civil Action No. 92-1753
Judge Little

MOTION TO COMPEL

NOW INTO COURT, through undersigned counsel, comes defendant, K-MART CORPORATION, who respectfully moves this court to issue an Order compelling plaintiff to provide defendant with her medical records authorization, all pursuant to the Rule 37 of the Federal Rules of Civil Procedure and for the reasons set forth in the attached memorandum.

Respectfully submitted,
Hudson, Pots, Bernstein
P.O. Drawer 3008
Monroe, LA. 71210-3008

By:_____
/s/Brian P. Bowes
Bar Roll #: 20120

CERTIFICATE

I, Brian P. Bowes, do hereby certify that a true and correct copy of the above and foregoing document has been mailed to all counsel for record, by mailing same, postage prepaid, all on this 4 day of February, 1993.

/s/_____
Brian P. Bowes

a11

United States District Court

WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Carrie Lois Qualls and Alfred Qualls

Versus

K-Mart Corporation

Civil Action No. 92-1753
Judge Little

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

MAY IT PLEASE THE COURT;

This matter arises out of alleged injuries sustained in a slip and fall accident at a K-Mart store in Ruston, Louisiana. Plaintiff, CARRIE LOIS QUALLS, alleges she sustained injuries to her neck, shoulder, back and temporal mandibular joint (TMJ). Defendant has denied that the accident occurred and that plaintiff's injuries are related to the accident. Hence, plaintiff's injuries and medical history are at issue in this case.

Plaintiff's deposition was taken on October 20, 1992. At her deposition plaintiff was asked by defense counsel to sign a form medical records authorization which would have permitted defendant to obtain plaintiff's current and prior medical records. (See deposition of Carrie Qualls at pages 57, 58, 59 and Qualls #2, excerpts are attached hereto). After marking through several lines of the requested authorization, plaintiff's counsel finally refused to permit his client to sign the authorization and stated that he would only sign such an authorization if it stipulated that defendant would immediately provide him with responses to defendant's various requests to the various health care providers.

Plaintiff's refusal to provide defendant with this authorization was clearly improper. Obviously, plaintiff's current and prior medical history are at issue in this personal injury action and defendant is clearly entitled to investigate plaintiff's medical history through a medical authorization without the necessity of having to request these formally through a subpoena duces tecum and incur this additional cost. Compare *Brown v. Eli Lilly Corporate* 131 FRD 176, 178 (D. Neb. 1988) (In a products liability action where plaintiff alleged that she contracted cancer due to her mother's injection of drugs, the plaintiff was ordered to sign authorizations for release of her medical records to defense counsel, by all providers of health services by whom she had been treated or received services); *Turick by Turick* 121 FRD 32, 36 (SD NY 1988) (court held that defendant was clearly entitled to obtained medical records and reports of plaintiff pertaining to claims arising out of accident and court ordered plaintiff to furnish defendants with a medical records authorization).

Defendant's need to investigate plaintiff's medical history is specifically compelling in the present matter. This is not the first time plaintiff has sued a department store for alleged injuries arising out of a slip and fall accident. Not long ago, plaintiff through her current counsel, filed suit against Bills Dollar Store of Jonesbore in a suit entitled *CARRIE QUALLS et al vs. CHARLES TRAINA et al*, 3rd Judicial District Court, Number 87-2218, which was finally settled out of court in October 1990. In that suit plaintiff alleged damages which included injuries to her back necessitating back surgery and required the treatment of numerous physicians. Plaintiff stated in her deposition that she was even required to retire from her job on disability because of this first slip and fall injury. However, in the present matter, plaintiff claimed in her deposition that her injury from the prior accident resolved and that she now has completely new injuries from the fall in the K-Mart Store. This may or may not be the case, but defendant submits that

given the nature of plaintiff's claims and her past medical history that defendant is entitled to the medical authorization to investigate plaintiff's medical history.

Plaintiff, by her action, is clearly thwarting and inhibiting a fair discovery process. Plaintiff's refusal to sign the authorization and her counsel's request for defendants to provide him with all records that defendants may receive in their investigation is only an attempt to piggy back on defendant's work product and pretrial investigation. Plaintiff certainly has the right to request her own medical records from her own physicians, without the obligation of providing all of these records to defendants without a formal discovery request. Indeed, under Louisiana's prescriptive statute, a personal injury plaintiff has a whole year to conceivably put his or her case together before the defendant may be given notice of the pending claim. Following this, a plaintiff may pick and choose the providers from whom he or she seeks medical records and provide only these records to defendants. Certain providers records that a plaintiff deems to be irrelevant may be omitted. This is standard practice and in fact defendant has so far only been supplied with records for subsequent treatment. Records regarding the prior injury have been omitted. However, because plaintiff's medical condition is at issue defendants are also entitled to search plaintiff's medical history to see if plaintiff's representations of her injury are true and consistent with her history or whether other medical history may be relevant. Thus, a defendant's request for a medical records authorization is also standard practice. If the plaintiff has been straight forward with his or her claim a plaintiff should have nothing to fear or hide from this authorization. But for unknown reasons in this case, plaintiff, with her actions, does not want access to her medical records to be equal. Plaintiff is demanding that defendant pay for her injuries and wants discreet access to her records while at the same time forcing defendant to incur the cost of formal subpoenas and/or providing plaintiff with the benefit of defendant's own work product and pretrial

investigation. Since plaintiff is being represented by the same counsel in this second suit, plaintiff probably has most of this information on hand anyway.

Fair play and equity dictate that plaintiff should provide defendant with the authorization it requested in plaintiff's deposition. Accordingly, for the reasons and authority cited above defendant respectfully requests that this court issue on Order requiring plaintiff to sign the authorization that defendant requested in plaintiff's deposition, without alteration or conditions.

Respectfully submitted
Hudson, Pots & Bernstein
P.O. Box Drawer 3008
Monroe, LA. 71210-3008

By:_____
/s/ Brian P. Bowes
Bar Roll #: 20120

CERTIFICATE

I, Brian P. Bowes, do hereby certify that a true and correct copy of the above and foregoing document has been mailed to all counsel of record, by mailing same, postage prepaid, all on this 4th day of February, 1992.

/s/_____
Brian P. Bowes

attached? Is that what it was?

A. Well, it was on the floor.

Q. Okay. Where was that in relation to the buggy with the—where was that in relation to the buggy with the frames in it?

A. It was across from that.

Q. Okay. Was there anything that called your attention to the picture frames prior to the time that the frame fell?

A. No.

Q. Okay. You didn't notice anything unusual about the frames when you entered the aisle?

A. No. I just—they were there in that buggy stacked up. You know, it was a buggy of frames there, pictures and frames stacked up.

MR. BOWES: I'm just going to wait to ask you to sign this authorization after your attorney has—

MR. STREET: Well, I don't think that's proper in a deposition. If you—we are not going to sign it like it is and I'm marking out objectionable parts of it.

MR. BOWES: Okay.

MR. STREET: And the only way that we would ever sign anything even after I have marked out the objectionable parts of it is on your specific agreement to immediately provide me with a copy of whatever you obtain pursuant to this medical authorization and that would be the only way that—that's the only way I ever allow my clients to sign anything like this. The purpose of that is because this is an adversary proceeding and both sides need to be apprised of the—if there is something being done with regard—particularly, something with regard to someone's medical records which ordinarily are privileged and like if we subpoena or depose people then both sides get notice and so forth. This thing had in it that it would be provided not only to you but some adjuster or agent, whoever that might be.

And, also, authorized oral information. And this is totally unacceptable to us.

MR. BOWES: Okay.

MR. STREET: But, we will sign if you want to fix it up along the lines I've indicated there. We'll sign it only on the specific agreement on your behalf to provide me with a copy of anything you obtain immediately upon your obtaining it.

MR. BOWES: Okay, So, she's not going to sign it as is?

MR. STREET: Right.

MR. BOWES: Okay. I want to attach that as Qualls No. 1 recognizing that it's not to scale.

(Qualls No. 1 marked and attached)

MR. BOWES: And attach the Authorization as Qualls No. 2.

MR. STREET: I'll object to that.

MR. BOWES: Okay. Subject to his objection I'd like to attach that.

(Qualls No. 2 marked and attached)

Q. I understand then that you will not sign the authorization, only your attorney's advice? I'm sorry, ma'am. That's a question to you, not to Dan.

A. Okay. Say what now?

Q. I understand you will not Authorization only because your attorney has instructed you not to?

A. Right.

Q. Okay. Are you on any medication today?

A. Just pain pills.

Q. Just pain pills?

A. Uh-huh (yes).

Q. Do you know what they are?

A. I just got some Advil in here for pain.

Q. Okay. Is that all you took today?

A. Uh-huh (yes).

MR. BOWES: That's all the questions I have. Thank you, Mrs. Qualls.

A Okay.

(Deposition concluded at 4:15 p.m.)

MEDICAL RECORDS

I, _____,do hereby authorize and consent to all physicians who have treated, examined or consulted with me concerning my health or state of health to furnish to _____ of _____, ~~or to his agent or adjuster~~, any medical information requested concerning my health or state of health in the past, present, ~~and future~~, including the furnishing or written reports to said attorney ~~/ or to his agent or adjuster~~ and I do further authorize and consent for all hospitals, clinics and infirmaries in which I have been a patient or an outpatient to furnish to said attorney, ~~or to his agent or adjuster~~, any and all medical records and reports, relating to my being a patient, whether outpatient, or inpatient, in said hospital, clinic or infirmary, and to make available on loan to said attorney, ~~or to his agent or adjuster~~, any x-rays, records furnished pursuant to this request shall be at the sole expense and account of said attorney; and shall not in any way be the expense or chargeable to me.

A photocopy of this authorization shall have the same effect as the original hereof.

THIS MEDICAL AUTHORIZATION give in _____, _____, on this ____ day of _____, 19___.

_____

AUTHORIZATION FOR MEDIAL RECORDS

I, _____, do hereby authorize and consent to all physicians who have treated, examined or consulted with me concerning my state of health to furnish to _____ of _____, or to his agent or adjuster, any medical information requested concerning my state of health in the past, present or future, including the furnishing of written reports and oral information to said attorney, his agent or adjuster, any and all medical records and reports, relating to my being a patient, whether outpatient, or inpatient, in said hospital, clinic or infirmary, and to make available on loan to said attorney, his agent or adjuster, any x-rays, records furnished pursuant to his to this request shall be at the sole expense and account of said attorney; and shall not in anyway be the expense or chargeable to me.

A photocopy of this authorization shall have the same effect as the original hereof.

THIS MEDICAL AUTHORIZATION give in _____, _____, on this _____day of _____, 19 _____.

_____

United States District Court

WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Carrie Lois Qualls and Alfred Qualls

Versus

K -Mart Corporation

Civil Action No. 92-1753
Judge Little

MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL

MAY IT PLEASE THE COURT:

This memorandum is submitted in opposition to the motion to compel filed by Defendant. By means of this motion, Defendant seeks to have Plaintiff ordered to sign a medical authorization which provides Defendant with the unfettered discretion to obtain any and all medical records ever developed with regard to Plaintiff which is clearly in violation of Plaintiff's constitutional right to privacy.

However, it should first be noticed that this motion is premature. Defendant has not used any discovery device recognized by the Federal Rules of Civil Procedure to obtain the information it seeks. *Defendant has made absolutely no request whatsoever, formal or informal to Plaintiff or her counsel for medical records pertaining to her prior accident and injuries.*

Defendant issued a notice for the taking of Plaintiff's oral deposition and Plaintiff appeared for counsel to take her deposition. During the course of this deposition, Defendant's counsel produced a medical authorization and asked Plaintiff to sign it.

This procedure is entirely improper. A deponent cannot be made to produce documents by oral demand at a deposition; nor can a notice of deposition be used to require the production of documents at a deposition. *Harrison vs. Prather*, 404 F.2d 267 (5th Cir.1968); *Samoff vs. Williamsport Building & Construction Trades Council*, 313 F.Supp. 1105 (U.S.D.C. MD Pa. 1970), affirmed, 451 F.2d. 272 (3rd Cir. 1971).

Without even making any type of request for the medical records generated in connection with the previous accident Defendant tells this Court in its memorandum that Plaintiff does not want access to her medical records to be equal. Plaintiff has no objection to Defendant obtaining medical records which are *relevant* to the present action; however, Defendant is not entitled to blanket access to Plaintiff's medical records and history with regard to matters not related to any of the claimed injuries.

Undersigned counsel routinely provides medical records from prior accidents on simple informal request. Here, no request, either formal or informal, has been made.

Furthermore, Defendant's comments concerning Plaintiff's prior back injury which did indeed cause her to have to retire from her teaching profession seem more calculated to influence this Court than to affect the claim. Plaintiff made absolutely no claim whatsoever in these proceedings for any lost earnings or lost future income or earning capacity. Plaintiff listed her injuries in Paragraph 5 of her petition and did not even claim that her prior back injury had been aggravated by the present accident.

Defendant has not even propounded interrogatories to find out who the previous doctors were and Defendant has not filed any request for production of any of the previous medical records or reports. Plaintiff is certainly in agreement that Defendant is entitled to such information. However, Defendant is not entitled to conduct a general fishing expedition of Plaintiff's medicals that do not even relate to any of the injuries claimed.

It has been recognized by the United States Supreme Court that a personal injury Plaintiff retains his or her constitutional right to privacy with regard to the person and medical-treatment of the person. In considering the question of medical examination under Rule 35, the Court in *Schlagenhaul vs. Holder*, 379 U.S. 104, 85 S.Ct.234 (S.Ct. 1964) stated as follows at 85 S.Ct. 240:

> "The chain of events leading to an ultimate determination on the merits begins with the injury of Plaintiff, an involuntary act on his part. Seeking court redress is just one step in this chain. If the Plaintiff is prevented or deterred from this redress, the loss is thereby forced on him to the same extent as if the defendant were prevented or deterred from defending against the action.
>
> Moreover, the rationalization of *Sibbach* on a waiver theory would mean that a Plaintiff has waived a right by exercising his right of access to the Federal Courts. Such a result might create constitutional problems."

The Court has also recognized that the right of privacy has no more conspicuous place than in the physician-patient relationship in the abortion case of *Roe vs. Wade*, 410 U.S. 134, 93 S.Ct.705 (S.Ct.1973) and *Doe vs. Bolton*, 410 U.S. 179, 93 S.Ct. 739 (S.Ct. 1973).

The requested medical authorization goes far beyond any right of the defense to obtain information. The requested medical authorization is not limited whatsoever in terms of the information sought and authorizes the furnishing of written reports and *oral information* to the defense attorney, his *agent or adjuster*. Can defendant truthfully argue that it is entitled to obtain records from Plaintiff's gynecologist when Plaintiff has not even made any claim of injury to her female parts?

In the case of *Alston vs. Greater Southeast Community Hospital*, 107 F.R.D. 35 (D.C.D.C. 1985) the Court was faced with a similar request which allowed the defense attorney to get oral information from the physicians. The request was denied. Citing other case law, the Court gave 5 reasons for the denial of such a request. First, in such a private oral conversation the defense attorney could go beyond was is relevant under Federal Rule of Civil Procedure 26. Second, the taking of depositions rather than oral discussion allows for the use of objections and protective orders if necessary. Third, the Court recognized that doctors are not trained in the law to know what is relevant and what is not and what goes beyond the bounds of propriety. Fourth, the Court found that private conversations with physicians are not contemplated by the Federal Rules. And fifth, the Court recognized that the physicians could refuse to discuss the case with the defense lawyer and that is was perfectly legitimate for the Plaintiff's attorney to so advise the physicians.

It has also been held that discovery of information from treating physicians must be in accord with the discovery rules. *Gardner vs. Ford Motor Company*, 61 F.R.D. 22 (D Alaska 1983).

The cases cited by Defendant do not support its position. In *Brown vs. Eli Lilly Corporation*, 131 F.R.D. 176 (D. Neb. 1988), unlike the present case, the request was made in the form of a request for production of documents. The Court held that the Defendant must prove that the information requested was relevant under Rule 26 and the Court held that it could not grant any general authorization without such proof. Please note that no such proof has been tendered by the defense in this case. The Court did order extensive production on the claim that cancer was caused by the Defendant's drug but on the grounds that the cause of such cancer could be very many things. There is no such condition presented in this case. In *Turick vs. Yamaha*, 121 F.R.D. 32 (S.D. N. Y. 1988) the Court does not discuss these

issues as the Plaintiff had not objected to the interrogatories which had been filed covering this question. The Court simply said that the Defendant is entitled to the reports of the Plaintiff's physicians, apparently speaking of the reports of the injury claimed in the suit.

Most incredible is the claim by Defendant that any records obtained by it pursuant to this authorization are its attorney's work product and therefore Plaintiff is not entitled to know what records have been obtained. Yet Defendant accuses Plaintiff of not wanting access to medical records to be equal.

Under these circumstances, since Defendant apparently claims that it is entitled to any and all medical records of Plaintiff, not just those related to the injuries claimed, the proper procedure will be for Defendant to issue subpoenas to medical providers with subpoenas duces tecum. This is the only way Plaintiff can know what is being sought and make appropriate objection or motion to quash if the information sought is not related to any of the claimed injuries. As stated earlier, Plaintiff, upon even a simple informal request from defense counsel, will provide a copy of all the medical records from the previous injury. It is suspected by undersigned counsel such a request has not been made because Defendant probably already has obtained those records from the defense counsel in the previous suit.

In any event, the relief sought in this motion to compel is totally beyond any relief authorized by the Federal Rules of Civil Procedure and no proper vehicle provided by those rules has been used by Defendant in this case. This request is therefore overbroad, unauthorized, violative of Plaintiff's constitutional right to privacy and without merit and the motion should be denied.

Respectfully Submitted:

C. Daniel Street
Attorney For Plaintiff
2901 Evangeline Street
Monroe, Louisiana 71201
(318)325-4418

By:_____
/s/C. Daniel Street
Bar No. 12530

CERTIFICATE

I hereby certify that a copy of the above and foregoing memorandum has been served upon Mr. Brian Bowes, Attorney for Plaintiff, by placing same in the United States mail, postage prepaid, properly addressed to him at Hudson, Potts & Bernstein, P. O. Drawer 3008, Monroe, Louisiana 71210-3008.

Monroe, Louisiana this 24th day of February, 1993.

/s/_____
C. Daniel Street

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 93-4232

In Re:

Carrie Lois Qualls,

Petitioner.

Filed Mar 9 1993
Richard E. Windhorst, Jr., Clerk

Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Western District of Louisiana

Before JOLLY, DUHE' and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition is DENIED.

United States District Court

WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Carrie Lois Qualls and Alfred Qualls

Versus

K -Mart Corporation

Civil Action No. 92-1753
Judge Little

Filed Mar 11 1993
Robert H. Shemwell, Clerk

ORDER

Considering the foregoing Motion:

IT IS ORDERED that the execution of this Court's "Ruling" dated February 26, 1993 ordering Plaintiff CARRIE LOIS QUALLS to execute a blanket medical release form is stayed until Plaintiff's Petition for Writ of Mandamus and/or Prohibition concerning said ruling is acted upon by the United States Supreme Court, provided that Plaintiff files same within (30) days of this date.

Alexandria, Louisiana this 11 day of March, 1993.

Copy Sent
Date:3/11/93
By:TRW
To:Street/Bowes

/s/_____
F.A. Little, Jr.
United States District Judge

The stay will be effective for 30 days and may be extended upon motion of counsel for plaintiffs showing that the matter is subject to U.S. Supreme Court consideration. Counsel will please keep the court informed of the developments of the writ application.

Supreme Court, U.S.
FILED
MAY 6 1993
OFFICE OF THE CLERK

NO. 92-1632

In the Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: CARRIE LOIS QUALLS

ON PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION
UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF LOUISIANA

OPPOSITION BRIEF TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION SUBMITTED BY RESPONDENT, K MART CORPORATION

Robert Baldwin
La. Bar No. 1224
HUDSON, POTS, & BERNSTEIN
P. O. Drawer 3008
Monroe, LA. 71210-3008
318-388-4400
ATTORNEY FOR RESPONDENT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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ARGUMENT

Defendant, **K Mart Corporation**, generally accepts the facts as set forth in the Statement Of The Case section of plaintiff's Petition for Writ of Mandamus and/or Prohibition. However, defendant opposes the relief requested by plaintiff for the following reasons.

I. PLAINTIFF HAS NOT INDENTIFIED A CONTROVERSY WHICH WOULD WARRANT THIS COURT'S ISSUANCE OF AN EXTRAORDINARY WRIT UNDER 28 U.S.C. § 1651(a)

To justify the granting of a writ under Rule 20 of this Honorable Court, as authorized by 28 U.S.C. § 1651(a) plaintiff must show (1) that the writ will be in aid of the court's appellate jurisdiction, (2) that there are present exceptional circumstances warranting the exercise of the court 's discretionary powers, and (3) that adequate relief can not be obtained in any other form or from any other court. Writs of mandamus and prohibition are used sparingly and only to confine an inferior court to the lawful exercise of its jurisdiction, to compel it to use its authority when it has a duty to do so, or to correct a clear abuse of discretion. *Evanson vs. Union Oil Company of California*, 619 F 2d 72 (1980), cert denied, 101 S. Ct 102 (1980). The remedy of mandamus within the Federal Courts is a drastic one, to be invoked only in extraordinary situations, amounting to a judicial usurpation of power. *Kerr vs. U.S. District Court for Northern District of California*, 96 S. Ct. 2119, 426 U.S. 394 (1976). Defendant submits that plaintiff has not shown how such a writ would be in aid of this Court's appellate jurisdiction, that there are exceptional circumstances warranting the exercise of this Court's discretionary powers and that adequate relief can not be obtained in any other form or from any other court. Plaintiff re-

quests an overturning of the district court's order compelling discovery. Generally, discovery orders are not jurisdictional and thus may not be reached under traditional concepts of mandamus except in the most extraordinary circumstances. *Colonial Times Inc. vs. Gash*, 509 F.2d 517 (D.C. App 1975). Specifically, plaintiff raises in her Petition the issue of physician/patient privilege and a claim of privilege does not enjoy a special status in considering a Petition for an Extraordinary Writ. *City of Los Angeles vs. Williams*, 438 F.2d 522 (9th Cir. 1971). Further analysis regarding plaintiff's failure to show circumstances warranting the issuance of an extraordinary writ is implicit in the additional arguments below.

II. THE DISTRICT JUDGE PROPERLY GRANTED DEFENDANT'S MOTION TO COMPEL AND WAS WITHIN HIS AUTHORITY OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiff argues that this matter presents the issue of whether the discovery ordered by the district court was far beyond the scope of discovery permitted by the Federal Rules of Civil Procedure. However, as plaintiff has suggested, the issue of physician/patient privilege is a matter of substantive law, and therefore the Federal Courts are to look to the laws of the state when rendering decisions regarding privilege. See for example, *Erie R. Co. vs. Thompkins*, 58 S. Ct. 817, 304 U.S. 64 (1938); *Lind vs. Canada Dry Corporation*, 283 F Supp 861, 863-65 (D. Minn. 1968); Federal Rules of Evidence, Rule 501.

The physician/patient privilege, like any other privilege, is not an absolute privilege and the existence or waiver thereof is addressed by state common law or statute. Most state jurisdictions have held that the filing of a lawsuit placing plaintiff's physical condition directly

at issue operates as an implied waiver of the personal injury plaintiff's physician/patient privilege. See Berens, *Defendants' Right to Conduct Ex Parte Interviews with Treating Physicians in Drug or Medical Device Cases,* 73 Minn. L. Rev. 1451, 1464, footnote 63 (1989). Additionally, state legislatures have adopted statutes reflecting various public interests that override the privilege. See Id at 1462, footnote 56. In Louisiana, the laws governing physician/patient privilege are set forth by statute. The statute establishes the privilege and provides the circumstances when the privilege is waived. Specifically, La R.S. 13:3734(C)(3), provides that a personal injury plaintiff waives the physician/patient privilege by providing in pertinent part:

> If any person brings an action to recover damages, in tort or for Workers' Compensation or under Federal or State Laws, for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that *any* health care provider who has attended such person at *anytime* may disclose *any* communication which was necessary to enable him to diagnose, treat, prescribe or act for said patient [emphasis added].

This waiver of privilege includes oral and written communications. The statute does not prohibit oral communications between defense counsel and the physician once the privilege is waived. Additionally, the statute expressly provides that the privilege is waived as to *any* health care provider regarding *any* communication made by the plaintiff to that provider at *anytime*. In fact, subsection (5) indicates that a defendant would not even need an authorization as is requested in this case as long as the physician "reasonabaly believes" that a personal injury action has been instituted by the patient. However, in

this action, defendant has acted in consideration to both the medical provider(s) and the plaintiff by requesting a written authorization. Compare *Glenn vs. Kerlin*, 248 So. 2d 834 (La. App. 2nd Cir. 1971) (patient/plaintiff could not claim invasion of right of privacy by physician's disclosure of plaintiff's physical condition without patient consent). Compare also Louisiana Code of Evidence Article 510(B)(a).

The District Judge was certainly within his authority to compel the production of the medical records authorization, See *Hickman vs. Taylor*, 329 U.S. 495, 501-07 (1947) (discovery should provide "fullest possible knowledge of issues and facts before trial"); *Brown vs. Eli Lilly Corporation*, 131 FRD 176, 178 (D. Neb. 1988) (in a products liability action where plaintiff alleged that she contracted cancer due to her mother's injection of drugs, the plaintiff was ordered to sign authorizations for release of her medical records to defense counsel, by all providers of health services by whom she had been treated or received services); *Turick vs. Turick*, 121 FRD 32, 36 (SD NY 1988) (court held that defendant was clearly entitled to obtain medical records and reports of plaintiff pertaining to claims arising out of an accident and court ordered plaintiff to furnish defendants with a medical records authorization). Hence, plaintiff's suggestion that neither the Federal Rules of Civil Procedure nor "any case law cited by defendant or the Honorable District Judge authorizes this action" is without merit or substance. In fact, as the Louisiana statute is so clear, it probably would not even be necessary to obtain a court order granting this relief as pursuant to the statute's authority defendant may simply approach each of plaintiff's treating physicians since plaintiff's mere filing of this suit has waived the privilege. This would be the same type of "informal discovery" that defendants would perform with any other non-party witness and which is not prohibited by the Federal Rules. However, and

obviously, plaintiff's signed authorization would have the duel effect of placing the physicians at ease in knowing that the patient has expressly consented to the release of medical information and also that the patient has been placed on notice that the defendant will be seeking records and interviewing plaintiff's physicians.

Plaintiff's argument that defendant did not provide proof that the discovery may lead to relevant information is also without merit since plaintiff's complaint alleges she incurred injuries to her back, neck and jaw which alone shows that her current and prior medical condition are at issue. Plaintiff also admitted in her deposition that back injuries were the subject of her prior lawsuit against another department store which included a similar slip and fall accident. Obviously, plaintiff placed her medical condition at issue in this suit and prior medical history may be relevant. Thus, there has been no abuse of the Federal Rules of Civil Procedure or the discovery process.

III. THE ORDER COMPELLING DEFENDANT'S REQUEST FOR ORAL INFORMATION FROM PLAINTIFF'S PHYSICIANS WAS PROPER

Next, plaintiff argues that the medical authorization ordered by the court was improper since it authorized defendant to obtain information orally from plaintiff's physicians. Defendant again refers the Court to the Louisiana Statute which does not prohibit this practice. Plaintiff, on the other hand, cites *Alston vs. Greater South East Community Hospital*, 107 FRD 35 (D.D.C. 1985) for authority stating that this practice has been "condemned". However, plaintiff neglected to cite several cases which have held that this is not only acceptable, but is an encouraged practice. See generally *Doe vs. Eli Lilly and Company*, 99 FRD 126, (D.D.C. 1983); *Discovery: Right to Ex*

Parte Interview with Injured Parties's Treating Physician, 50 ALR 4th 714, § 3 at page 719; Berens, supra at 1473, footnote 104. Indeed, absent privilege, either counsel may conduct ex parte interviews with any witness concerning information relevant to the pending litigation and neither party is entitled to restrict this free flow of information. See *Doe v. Eli Lilly*, supra at 128. (no party "has anything resembling a proprietary right to any witness's evidence"). Although the Federal Rules expressly provide only for depositions, the Federal Rules do not act to prohibit informal interviews. To deny defendants the chance to meet privately with plaintiff's non-party treating physicians would give the plaintiff complete control over an important group of witnesses in a personal injury suit. Allowing access to the physician only by use of deposition is scarcely equal access to the physician as plaintiff's counsel may informally interview his client's physician at anytime as long as he has his client's consent (which is given 99.999% of the time). However, from a defendant's standpoint, a deposition is less likely to produce these spontaneous, candid responses from the physician. 50 ALR 4th at 717.

Other benefits from the practice of informal interviews include: decreased litigation costs, the potential to eliminate non-essential witnesses, early evaluation and settlement of claims, easier scheduling of interviews than depositions. Id. If defendants must depose each of plaintiff's physicians, while plaintiff need not, then the defendants alone must spend a significant amount of money to question a witness who may or may not turn out to possess relevant information. This could be an especially tremendous burden to obtain information from any out of state witnesses.

IV. THE PHYSICIAN/PATIENT PRIVILEGE WAS DESIGNED TO PROMOTE PHYSICAN/PATIENT CONFIDENCE, NOT TO FOSTER PLAINTIFF'S CONTROL OVER DISCOVERY. PLAINTIFF HAS OTHER AVAILABLE REMEDIES TO PROTECT NON-DISCOVERABLE MEDICAL INFORMATION.

As the court in *Doe v. Eli Lilly* noted, the physician/patient privilege is obviously designed to promote communication between the physician and the patient by placing confidence in the patient that certain information which might result in harm, humiliation, embarrassment or disgrace might never be disclosed. However, the privilege was not designed to be used as a litigation tactic by a personal injury plaintiff who may gain some advantage by controlling the release or the timing of the release of certain information that may be relevant to the case. Obviously, the medical history of a personal injury plaintiff is probably the most sought after information of a personal injury defendant. Hence, therein lies the danger of permitting the plaintiff to determine which records or physicians may be relevant to this proceeding as general rules of discovery provide that the parties are entitled to discover any information which might be relevant or which may lead to relevant information. For example, in her opposition brief to defendant's Motion to Compel, plaintiff argued that her gynecologist's records would be completely non-discoverable. It is probably *almost* a given that any information contained in a gynecologist's records would probably have nothing to do with this claim for injuries to plaintiff's neck, back, and jaw. However, *if* plaintiff also previously complained to her gynecologist of neck pain, jaw pain, headaches, etc., particularly prior to the accident in question, this would certainly be information relevant and discoverable in these proceedings.

If there is some dark or embarrassing secret lurking in plaintiff's medical background, certainly plaintiff already knows this and plaintiff has a remedy to protect the disclosure of such information. Plaintiff may apply to the court for a protective order to address such issues. If indeed plaintiff sought to hide information which dealt with an area that had absolutely nothing to do with this claim and which may otherwise harm or embarrass her, then defendant would concede to plaintiff's argument. It is not defendant's intention to harm or embarrass the plaintiff in this case. It is simply defendant's intention to defend itself in this lawsuit. It was plaintiff, not the defendant, who placed her medical condition at issue. Thus, plaintiff's argument that she is entitled to prior notice or that the authorization inhibits that right is also without merit. Despite plaintiff's opposition to the order compelling the medical records authorization, plaintiff more than anyone is aware of her medical history and still has ample remedy within the Rules of Civil Procedure to prohibit the disclosure of certain medical information. Compare also *Mid American Process Services vs. Ellisten*, 767 F.2d 684 (10th Cir. 1985) (writ of mandamus was not issued to compel Federal District Court to prevent discovery in a civil action since petitioners, by seeking postponement or protective order from District Court adequately protected their rights).

Defendant further notes that throughout these proceedings, in her opposition to defendant's Motion to Compel, in her Writ Application to the Fifth Circuit U.S. Court of Appeals, in her memorandum in support of her Motion to Stay the Execution of the Order Compelling the Medical Records Authorization submitted to the district court, and finally in her Petition to this honorable Court, plaintiff has not disclosed or even suggested what condition in her medical background needs to be protected. Plaintiff has

been unwilling to disclose this to defense counsel and has likewise been unwilling to disclose this to the three various courts. Although there may be other persons or legal organizations that may conceivably have an interest in an outcome of this matter before this honorable Court that provides a favorable litigation tactic to personal injury plaintiffs in general, plaintiff has so far been unwilling or failed to show her specific interest or her potential damage which would support an overturning of the district court's order compelling the medical records authorization.

V. PLAINTIFF HAS NOT INDENTIFIED A CONSTITUTIONAL RIGHT OR AN UNCONSTITUTIONAL VIOLATION THEREOF

Plaintiff also claims that her constitutional right to privacy has been violated by the district court's order. To the contrary, as explained above, the instant matter is simply an issue of physician/patient privilege which is defined by state substantive law and is not a matter of constitutional interpretation. It has been appropriately addressed by statute by the Louisiana Legislature. Plaintiff suggests that her right of privacy in the physician/patient relationship stems from the "penumbra" of rights discussed in *Griswold vs. Connecticut*, 381 U.S. 617, 85 S.Ct. 1678 (1965) and plaintiff draws a comparison between the cases of *Roe vs. Wade*, 410 U.S. 134, 93 S.Ct. 705 (1973) and *Doe vs. Bolton*, 410 U.S. 179, 93 S.Ct. 739 (1973) both of which dealt with a state's interest in regulating abortions. However, plaintiff has not explained how the disclosure of a certain plaintiff/patient's general medical history to a defendant attempting to defend itself in a personal injury lawsuit somehow violates a 14th Amendment right of privacy. Compare *Glenn*, supra. The Louisiana Legislature has established a physician/patient privilege as stated above. The legislature has also defined the circumstances

when the privilege is waived. Hence, plaintiff's privilege is sufficiently protected by state statute.

Finallly, even if plaintiff has demonstrated a fundamental right of privacy arising under the 5th or 14th Amendments, plaintiff has not demonstrated how this right has been unconstitutionally violated nor has plaintiff analyzed, by way of a balancing of interests formula, the state's interest in "interfering" with this right. For example, in response to this analysis, defendant would submit that the State of Louisiana has a compelling state interest to "interfere" with the "right" when a personal injury plaintiff has sued a defendant and made her medical condition a public issue by virtue of filing a lawsuit for personal injuries. After all, these same physicians to which plaintiff intends to prohibit defendant's access, may be subpoenaed by the court to testify at trial and an informal ex parte interview would merely allow the defendant access to relevant information prior to trial, outside of the public courtroom. An interview with plaintiff's physician would likewise not threaten plaintiff's medical treatment with that physician because the physician would remain legally and ethically obligated to give the patient proper medical care. Berens, supra at 1482. It is not as though defendant is attempting to inferfere with that relationship. The interest of the state in streamlining litigation and facilitating equal and fair access to information to litigants in personal injury suits is certainly in the best interest of the state's judicial system.

CONCLUSION

WHEREFORE, for the reasons outlined above, defendant, **K MART CORPORATION,** respectfully requests that plaintiff's Petition be denied and that the order of the Honorable F. A. Little, Jr., District Judge, be upheld and that plaintiff be required to immediately provide the medical records authorization as outlined in the District Judge's order.

Respectfully submitted,
HUDSON, POTS, & BERNSTEIN
P. O. Drawer 3008
Monroe, LA. 71210-3008

BY: _____
Robert Baldwin
Bar Roll #1224

CERTIFICATE

I, Robert Baldwin, do hereby certify that a true and correct copy of the above and foregoing document has been mailed to plaintiff through Daniel Street and to the Honorable F. A. Little, Jr., United States District Judge, by mailing same, postage prepaid, all on this _____ day of _____, 1993.

_____
Robert Baldwin